IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 29, 2007 Session

SANDRA E. HARBER v. TRACY K. HARBER

Appeal from the Chancery Court for Anderson County
No. 91 DR 0084 William E. Lantrip, III, Chancellor

No. E2007-00547-COA-R3-CV - FILED MARCH 31, 2008

The respondent, Tracy K. Harber ("Father"), appeals an order of the trial court holding him in civil contempt and ordering him to pay a net child support arrearage of $67,510 plus accrued interest of $143,852.51. Father appeals. We have determined that the correct amount of interest is $74,618.62. Therefore, so much of the trial court's judgment as awards interest is modified to reflect interest of $74,618.62. As modified, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

J. Phillip Harber, Clinton, Tennessee, for the appellant, Tracy K. Harber.

Dail R. Cantrell, Clinton, Tennessee, for the appellee, Sandra E. Harber.

OPINION

I.

On January 31, 1992, in an earlier proceeding in this case, the petitioner, Sandra E. Harber ("Mother"), was awarded an absolute divorce from Father. The trial court awarded Mother custody of the parties' minor son, Gilbert,[1] and ordered Father to pay child support of $105 per week.

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[1]Gilbert Harber turned 18 on August 19, 2004.

Following the 1992 divorce, Father's parents allowed Mother and the child to live rent free in a house owned by them in Clinton. Father's parents also periodically helped Mother with monetary gifts and by providing child care assistance and transportation.

On May 15, 2006, Mother filed a petition for civil contempt predicated upon Father's failure to pay child support. The petition alleged that, as of May 1, 2006, Father was in arrears in an amount that exceeded $73,000. Mother requested that Father be held in civil contempt and that she be awarded a judgment against him for the past-due child support, as well as attorney's fees and costs. She also sought post-judgment interest on each of the delinquent payments.

At a hearing held on January 12, 2007, Mother testified that Father had never paid any child support pursuant to the trial court's 1992 order. Mother admitted that she had lived rent free in a house owned by her former in-laws, and that they had provided transportation for her and the child. According to Mother, any help she received from Father's parents was in the nature of a gift. In this connection, she noted that, after the divorce, she and her son had maintained a close relationship with the paternal grandparents. She testified that her in-laws had never informed her that they were allowing her to live in the house in lieu of Father paying child support. On cross-examination, she admitted that Father had given her approximately $1,055 over a period of time. Mother further acknowledged that she filed the lawsuit after all these years because Father had come into an inheritance as a result of the death of his parents.

Father argued that Mother had knowingly accepted support from his parents in lieu of Father's payments. He urged the court to recognize the importance of the fact that Mother had waited until the death of his parents before filing her petition. Father claimed that he had given Mother money over the years when he could afford it.

The trial court held that Father was in civil contempt because of his willful failure to pay child support. Based upon the parties' stipulation, the court determined that the base amount of child support owed, excluding interest, was $68,565, being 653 weekly payments of $105. Against this amount, Father was given credit for the $1,055 that Mother acknowledged he had paid. Thus, the trial court held that Father owed net child support of $67,510. The court also ruled that Father owed statutory post-judgment interest on each weekly child support obligation, at a rate of 10% from February 7, 1992, through July 31, 1995, and from that date forward at a rate of 12%. The total amount of interest owed was calculated to be $143,852.51, making the total amount owed, including interest, to be $211,362.51. As to Mother's request for attorney's fees, the trial court held that, because there had been such a long delay in pursuing the claim, that there would be no award of fees. Court costs were assessed to Father. Father appeals.

II.

Father presents the following issues:

1. Whether the trial court erred in failing to find that there was a contract, implied in fact or implied in law, that Mother would not pursue child support payments from Father in return for free rent and other support from Father's parents.

2. Whether the trial court erred in sustaining the hearsay objection of Mother's counsel to testimony by Father's sister.

3. Whether the trial court erred in its finding that the interest owed on the stipulated net arrearage totaled $143,852.51.

Mother raises a separate issue – whether the appeal in this action is frivolous as defined in Tenn. Code Ann. § 27-1-122 (2000).

III.

To the extent these issues involve questions of fact, our review of the trial court's judgment is *de novo* with a presumption of correctness as to the trial court's factual findings. Tenn. R. App. P. 13(d); *e.g.,* ***Berryhill v. Rhodes***, 21 S.W.3d 188, 190 (Tenn. 2000). We may not alter the trial court's factual findings unless they are contrary to the preponderance of the evidence. ***Id.*** With respect to the court's legal conclusions, our review is *de novo* with no presumption of correctness. ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000).

IV.

A.

Father argues that the preponderance of the evidence presented at trial supports the conclusion that there was an agreement, whether overtly expressed or merely understood, between Mother and his parents that Mother would accept their support in the form of habitation, monetary assistance, transportation, and other benefits, in lieu of Father's obligation to pay child support of $105 per week. According to Father, such a contract should be implied from the parties' conduct.

As previously noted, the operative child support order was entered January 31, 1992, setting Father's weekly child support obligation at $105. In Tennessee, child support is awarded pursuant to the Child Support Guidelines, which have the force of law.[2] ***Nash v. Mulle***, 846 S.W.2d 803, 804 (Tenn. 1993). Tenn. Code Ann. § 36-5-101(f)(1) (Supp. 2007) provides:

[2]The General Assembly adopted the Child Support Guidelines promulgated by the Tennessee Department of Human Services in order to maintain compliance with the Family Support Act of 1988, 42 U.S.C. §§ 651-669, which provided federal funding to assist states in securing and enforcing judgments for child support. In order to receive those funds, states were required, among other things, to "establish guidelines for child support award amounts within the state." (Quoting 42 U.S.C. § 667(a)).

> Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, and shall be entitled to full faith and credit in this state and in any other state. Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties. If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage, at the rate of twelve percent (12%) per year. . . .

Id. As can be seen, an existing child support order cannot be modified for any period of time prior to the date on which the moving party files a petition for modification. ***Alexander v. Alexander***, 34 S.W.3d 456, 460 (Tenn. Ct. App. 2000).

In the matter before us, the trial court was not authorized to forgive an accrued child support arrearage, but could only modify the child support obligation back to "the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties." Tenn. Code Ann. § 36-5-101(f)(1). In this case, prior to the filing of the instant petition by Mother, Father never requested a modification of the divorce judgment to obtain "credit" for the "payments" made pursuant to the purported agreement between Mother and his parents. Thus, the trial court had no authority to award the relief sought by Father, as such would constitute an impermissible retroactive modification of the operative child support order.

B.

Father next claims that the trial court erred when it prevented the introduction of evidence of an agreement between his parents and Mother by way of the testimony of his sister, who was allegedly present during a conversation discussing the situation. In Father's brief, he notes as follows:

> Defendant's sister was not allowed to testify about a conversation she, Plaintiff, and her and Defendant's deceased mother had concerning child support. The sister would have offered an admission by Plaintiff that Plaintiff was accepting child support from her and Defendant's parents."

The subject questions and responses are as follows:

> Q. Were you ever in a conversation where you, your mother and Sandra were present, and discussed them living in the house?

A. Yes.

Q. Relate that conversation.

MR. CANTRELL: I'm still going to object to that as being hearsay, Your Honor.

MR. HARBER: She was present.

THE COURT: Sustain the objection.

Mother states that her objection was directed at statements made by Father's parents. She does not dispute that "admissions" by her would be admissible.

The Tennessee Rules of Evidence provide that any error by a trial court may not be predicated upon a ruling which admits or excludes evidence unless "a substantial right of the party is affected," and when the ruling excludes evidence, "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context." Tenn. R. Evid. 103. As this rule of evidence provides, the burden was on Father to preserve the substance of the evidence he expected his sister to present so that the court could determine whether a substantial right had been affected. Father did not make such an offer of proof. An appellate court cannot make a proper determination without knowing what the excluded evidence would have been. ***Stacker v. Louisville & N. R. Co.***, 61 S.W.766, 766 (Tenn. 1901); ***Davis v. Hall***, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995); ***State v. Pendergrass***, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989). Generally, an appellate court will not consider an issue relating to the exclusion of evidence when a tender of proof was not made. ***Dickey v. McCord***, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001); ***Rutherford v. Rutherford***, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997); ***Shepherd v. Perkins Builders***, 968 S.W.2d 832, 833-34 (Tenn. Ct. App. 1997).

It is not clear from the transcript of the subject testimony whether the witness was being asked to relate something one or both of Father's parents had said or whether the questioner was attempting to elicit something Mother had said. Perhaps, the examination was designed to do both. Without a transcript of the excluded testimony, it is impossible to discern exactly what the questioner was trying to do. Accordingly, we find no error in the trial court's ruling on this line of questioning.

C.

Father also takes issue with the manner in which the trial court calculated interest. According to Father, interest on the judgment was calculated on a compound basis. Father notes that interest on judgments is simple, not compound. *See* ***Berryhill v. Rhodes***, No. W2001-00748-COA-R3-JV, 2002 WL 927442 (Tenn. Ct. App. W.S., filed May 2, 2002). *See* Tenn. Code Ann. § 47-14-102(7) (2001).

In relevant part, Tenn. Code Ann. § 36-5-101(f)(1) provides as follows:

> Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, . . . If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage at the rate of twelve percent (12%) per year. All interest that accumulates on arrearages shall be considered child support. Computation of interest shall not be the responsibility of the clerk.

Tenn. Code Ann. § 47-14-122 (2001) states the following:

> Interest shall be computed on every judgment from the day on which the jury or the court, sitting without a jury, returned the verdict without regard to a motion for a new trial.

With the aid of a computer software program, we have calculated the interest due based upon the applicable statute.[3] The parties stipulated that the arrearage consisted of 653 weekly payments of $105 each, *i.e.*, a total of $68,565. The first payment was due February 7, 1992, and the last payment was due in August 2004 when the child reached the age of 18. The model employed by us calculated simple interest at the rate of 10% until July 31, 1995, when the statutory rate of interest increased to 12%. Thereafter, we calculated interest at the higher rate. Interest was calculated on each weekly payment. Our calculation reflects interest computed during the 10% interest period totaling $3,336.67 and total interest of $71,281.95 for the period of time during which the 12% interest rate was mandated by Tenn. Code Ann. § 36-5-101(f)(1). Thus, the total interest is $74,618.62 and not $143,852.51. Accordingly, the trial court's judgment is modified so as to delete the interest figure of $143,852.51 and substitute the interest figure of $74,618.62.

D.

Mother contends that Father's appeal is frivolous and that she is entitled to an award of damages pursuant to Tenn. Code Ann. § 27-1-122. Father was successful on appeal in securing a $69,233.89 reduction in post-judgment interest. Obviously, his appeal was not frivolous.

V.

The judgment of the trial court is modified and, as such, is affirmed. Exercising our discretion, we tax the costs on appeal half to the appellant, Tracy K. Harber, and half to the appellee,

[3] *See* Tenn. Code Ann. § 36-5-101(f)(1) before and after amendment effective July 31, 1995.

Sandra E. Harber. This case is remanded to the trial court for enforcement of the trial court's judgment, as modified, and for the collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE